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No. 73, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF CALIFORNIA, PLAINTIFF

*v.*

STATE OF NEVADA

*ON THE REPORT OF THE SPECIAL MASTER*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
*Solicitor General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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This memorandum is submitted in response to the Court's order of February 19, 1980, inviting the Solicitor General to express the views of the United States.

1. Although contemplating future proceedings and making recommendations with respect to them (which we discuss below), the present Report of the Special Master primarily tenders for the Court's approval a determination of the true boundary between the States of California and Nevada. The definition of the two segments of that boundary—one running north-south along the 120th meridian, the other running obliquely from the intersection of the north-south line and the 39th parallel to the intersection of the 35th parallel and the Colorado River—is not in dispute. But, because several inconsistent surveys have purported to map those lines, or portions of them,

the question arises which survey should be accepted as effectively locating the boundary, or whether a new survey should be run.

We endorse the Special Master's solution of the problem. He concluded that the last complete survey of the north-south boundary, the so-called Von Schmidt line of 1872, should be adopted for that segment, and the subsequent Coast and Geodetic Survey line of 1893-1899 should be adopted for the oblique segment of the boundary. Report 49, para. 1. Both of these lines were run by United States surveyors, pursuant to special Congressional direction. Report 22, 27-28. But it is not for that reason that the Master preferred them. Nor do we support his conclusion on that ground. The Master reached his recommendation because these two surveys were the latest, the most complete and the most accurate (Report 29-34), and, primarily, because both States have acquiesced in treating these lines as the interstate boundary for more than a century in one case and some 80 years in the other. Report 35-37, 45.

In our view, the last consideration is dispositive. In the case of the oblique boundary, both States formally adopted the Coast and Geodetic Survey line by statute in 1901 and 1903. Report 45. While the Von Schmidt north-south line was not similarly confirmed by State legislative action (Report 35), it is undisputed that, ever since 1873, that line has been used by both States in the exercise of jurisdiction. Report 45. In these circumstances, we believe the Master was fully justified in invoking the doctrine of prescription and acquiescence as laying the matter to rest. Report 41-48. See *Ohio* v. *Kentucky*, 410 U.S. 641, 649-651 (1973), and cases there cited.

2. After recommending the lines which, in his view, represent the true boundary between the two States, the Special Master turns to minor technical matters. Because the recommended north-south line and the oblique line do not intersect exactly at the 39th parallel (as, in principle, they should), the question arises how they should be connected. The Master urges that the State parties should be free to resolve that matter by agreement, failing which he would recommend a solution. Report 49-50, para. 2. In fact, as we read their respective briefs, California and Nevada have already agreed that the appropriate course, assuming the Court approves the Master's major boundary determinations, is to extend the oblique boundary in a straight line to the point where it meets the north-south boundary (Nev. Br. 45, 51; Cal. Br. 49-51),[1] thereby avoiding what California aptly characterizes as "unsightly dog-legs" in the middle of Lake Tahoe (Cal. Br. 50). The simplicity of this resolution commends it, in our view, and we urge the Court to accept that determination.

The Special Master also seeks authority to arrange for any necessary further resurveying of the lines he has recommended if the parties disagree as to their location on the ground. Report 50, para. 3. The cost would be borne equally by the two States. *Ibid.* Although we are not aware of any dispute as to the location of these lines, again, the Master's recommendation seems entirely reasonable. The United States would, of course, fully cooperate in any necessary work by supplying all relevant information at the disposal of the Government.

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[1]We here refer to the documents entitled "Nevada's Exceptions to Report of Special Master and Brief" and "Plaintiff's Brief in Support of Special Master's Report," both filed in December 1979.

3. We come now to the Special Master's final recommendations (Report 50-51, paras. 4-6), suggesting further proceedings to settle the title consequences of a ruling by the Court endorsing his boundary determinations. That matter arises because, in May 1979, California submitted to the Special Master a Motion to File Amended Complaint and Bifurcate Issues which alleged that the United States has confirmed or clear-listed lands in California to Nevada, and vice-versa, in derogation of the controlling grant statutes; that most such lands were in turn patented to individuals by the State which had obtained federal approval; and that the validity of these State selections and the patents issued under them is in doubt. See Report 11-13.

*a.* The existing parties appear to agree that "title" proceedings to resolve these questions, if appropriate at all, ought to follow, rather than precede, this Court's final decision fixing the interstate boundary. See Report 14. For our part, we endorse that course. Any effort to quiet titles along the boundary must obviously await a binding determination as to its location, still disputed between the States. There remains to consider, however, whether such proceedings, in this Court, are necessary, and, if so, what role the United States should play.

*b.* If all the territory disputed between the two States were still held by the United States—whether as part of the public domain or in reserved status—or if the lands had been patented directly by the United States to individuals, fixing the interstate boundary would affect only political jurisdiction and no further title proceedings would be necessary. But substantial acreage has passed into State hands and most of it, in turn, to private owners, and it appears that some of these selections were made, and subsequent patents issued, by each State in

what is the territory of its neighbor—or at least by Nevada in California. California has questioned the validity of such extraterritorial selections and patents and seeks leave to file an amended complaint putting the matter at issue. Nevada apparently asserts that at least private titles, although derived from a sovereign acting beyond its jurisdiction, are not open to challenge, but seems to agree that the matter should be settled. In these circumstances, a genuine controversy exists and, when the boundary is finally fixed, further proceedings to resolve the title questions seem unavoidable.

It might be supposed that the title consequences could be resolved by administrative proceedings within the Department of the Interior. But it is far from clear that that Department retains jurisdiction to correct any error in approving or "clear-listing" selections made by one State in the territory of the other, especially where patents to individuals have issued. Moreover, neither State suggests that it would accept such administrative determinations if undertaken. Nor does it seem possible to finally resolve the matter in a quiet title action initiated in a district court by one State against the United States under 28 U.S.C. 2409a. Insofar as the States themselves are at odds over the question, this Court is the only federal forum with jurisdiction. 28 U.S.C. 1252(a)(1); *California* v. *Arizona*, 440 U.S. 59, 61, 63 (1979). Accordingly, the Special Master was correct, we believe, in recommending that California be granted leave to file its amended complaint (Report 50, para. 4)—albeit without presently joining any federal defendants.

*c*. We reach, finally, the question of the role of the United States in any such further proceedings. Although he has recommended allowance of California's amended complaint, which names the United States and the

Secretary of the Interior as added defendants, the Special Master clearly intends to reserve the matter of joining the federal Government until after he has consulted further with the present parties and the Office of the Solicitor General. Report 50, para. 5. We welcome that course.

To be sure, there is no longer any doubt that the United States can be joined as a defendant if it asserts title to any of the lands in dispute. *California* v. *Arizona, supra.* Nor do we suppose this Court lacks jurisdiction to entertain an action in which both States, in controversy with each other, seek to compel the Department of the Interior to rescind or confirm earlier administrative decisions approving erroneous State selections, if that Department still has competence in the matter. See 5 U.S.C. 702. But it may well be that the United States will disclaim all interest in the disputed lands and the Master may conclude that the Department of the Interior has long since lost jurisdiction to take any curative action. In that event, it would not seem necessary or appropriate to join the United States or its officers in the contemplated title proceedings.

Because the United States has not yet reached a final conclusion as to its interest or competence in respect of the lands at issue, the Master's recommendation seems entirely appropriate. Should the United States fail, promptly after this Court's boundary determination, formally to disclaim all interest in the contested acreage, or fail to satisfy him that the Government is powerless to take remedial action, the Special Master, we suggest, should be authorized to join the United States as a party defendant in the future proceedings. There is no occasion to prejudge the outcome of the contemplated consultations at this stage. At all events, the United States

would, of course, afford the Master all reasonable assistance in carrying out his task.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

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